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IN THE SUPREME COURT OF THE STATE OF ARIZONA

In the matter of

AMENDMENT OF RULES 32.4(C),
32.6(A), AND 32.6(B)

) R-08-0010

) **REPLY IN SUPPORT OF**
) **PETITION TO AMEND RULES**
) **32.4(C), 32.6(A), AND 32.6(B)**

Robert Hirsh, the Pima County Public Defender, makes the following reply to the comments filed concerning the proposed amendment to Rules 32.4(c), 32.6(a), and 32.6(b).¹

A. Post Conviction Relief Proceedings under Rule 32 protect the defendant due process rights as well as the state and victims rights to a finality.

The Maricopa County Attorney places his objections to the proposed rule change in the context of the purpose of Rule 32. Post-conviction relief protects important constitutional rights and the provisions of Rule 32 balance the need for finality with the defendant's right to have errors corrected.

¹Unless otherwise specified all the Arizona Rules of Criminal Procedure are meant.

“Rule 32 proceedings and direct appeal are both devices for ensuring that every defendant receives due process of law.” *Montgomery v. Sheldon*, 181 Ariz. 256, 258, 889 P.2d 614, 616 (1995). When a person has pled guilty and an appeal is not available, A.R.S. § 13-4033(B); Rules 17.1(e) and 27.9(e), and Rule 32 provide the right to appeal guaranteed by the Arizona Constitution. *Wilson v. Ellis*, 176 Ariz. 121, 123, 859 P.2d 744, 746 (1993); *Montgomery*, 181 Ariz. at 258-59, 889 P.2d at 616-17; *State v. Smith*, 184 Ariz. 456, 458, 910 P.2d 1, 3 (1996).

Rule 32 is also the primary means of asserting the rights protected by habeas corpus, which is guaranteed by Art. 2, § 14 of the Arizona Constitution. Rule 32.1, cmt (“It is intended that this rule encompass all the grounds presently available in Arizona under a writ of habeas corpus, Ariz. Const. Art. 2, § 14”); Rule 32.3, cmt (the writ is retained but “is subordinated to the remedy provided by this rule in much the same way as the federal writ of habeas corpus, . . . is subordinated for federal prisoners to the motion to vacate judgment.”).

Rule 32 balances the rights of the defendant and the rights of the victim and the state to finality by limiting the issues that can be raised. First, it consolidates five of the previous seven forms of post-conviction relief and requires that the claims be brought together in a single petition. Rule 32.1, cmt. Furthermore, issues that were raised and resolved, or that could have been raised, on appeal or in a prior rule 32 petition may not be raised. Rule 32.2(a). “Rule 32.2 is a rule of

preclusion designed to limit those reviews, to prevent endless or nearly endless reviews of the same case in the same trial court.” *Stewart v. Smith*, 202 Ariz. 446, 450 ¶ 11, 46 P.3d 1067, 1071 (2002). As the Maricopa County Attorney notes, “Rule 32 . . . is not designed to afford a second appeal, . . . It is not intended to unnecessarily delay the renditions of justice or add a third day in court when fewer days are sufficient to do substantial justice.” *State v. Carriger*, 143 Ariz. 142, 145, 692 P.2d 991, 994 (1984).

Rule 32 plays a unique role in the review of convictions. “Rule 32, . . . , provides a remedy for matters which do not have sufficient record to provide appellate review.” *State v. Cabrera*, 114 Ariz. 233, 236, 560 P.2d 417, 420 (1977). Rule 32 is the only procedure for raising ineffective assistance of counsel. *State ex rel. Thomas v. Rayes*, 214 Ariz. 411, 414 ¶ 16, 153 P.3d 1040, 1043 (2007).

Rule 32.1 includes many separate procedures. It should be noted that Rule 32.4(c) provides that “[i]n a Rule 32 of-right proceeding, counsel **shall** investigate the defendant’s case for any and all colorable claims.” (Emphasis added.) Furthermore, thorough investigation is necessary because issues not raised in the Rule 32 petition may be waived in a subsequent federal habeas corpus petition. *See, O’Sullivan v. Boerckel*, 526 U.S. 838, 119 S.Ct. 1726 (1999).

B. Post Conviction Relief Petitions involving Newly Discovered Evidence.

The Maricopa County Attorney argues that newly discovered evidence claims do not require more time because under Rule 32.4(a), they can be made at any time. However this does not mean that the petition will not involve investigation. In the two cases cited, *State v. Bilke*, 162 Ariz. 51, 781 P.2d 28 (1989), and *State v. Cooper*, 166 Ariz. 126, 800 P.2d 992 (App. 1990), medical investigation was required. This means that medical records and an expert opinion must be obtained. The fact that the prisoner has been diagnosed with a disease or condition does not establish that it existed at the time of sentencing. Other newly discovered evidence also requires investigation. For example, if a witness has surfaced, he or she must be interviewed, and further investigation conducted. The Maricopa County Attorney seems to imply that this could be done before the filing of the notice of Rule 32. However, the Arizona Public Defender Act does not permit the public defender's office to work on a case before it is appointed, A.R.S. § 11-584(A)(1) ("The public defender shall perform the following duties: 1. Upon order of the court . . ."), and it is only appointed after the notice of Rule 32 is filed. Rule 32.4(a); Rule 32.4(c). Thus, investigation cannot be conducted before the public defender is appointed and the 60-day time limit begins. Second, subpoenas and other discovery mechanisms provided by the Rules of Criminal Procedure are

only available *after* the petition of post-conviction relief has been filed. *Canion v. Cole*, 210 Ariz. 598, 599-601 ¶¶ 7-18, 115 P.3d 1261, 1262-64 (2005).

C. Post-Conviction Relief Petition Involving Ineffective Assistance of Counsel.

The Maricopa County Attorney also discusses claims of ineffective assistance of counsel. In such a claim “[t]he defendant must show that counsel’s performance was deficient, and that the deficient performance prejudiced his defense.” *State v. Runningeagle*, 176 Ariz. 59, 63, 859 P.2d 169, 173 (1993). There is a right to effective counsel at trial, on appeal, and on the first Rule 32 petition arising from a plea. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984); *Evitts v. Lucey*, 469 U.S. 387, 396, 105 S.Ct. 830, 836 (1985) (appeal); *State v. Berlat*, 146 Ariz. 505, 509, 707 P.2d 303, 307 (1985) (appeal); *State v. Pruett*, 185 Ariz. 128, 131, 912 P.2d 1357, 1360 (App. 1995) (first petition for post-conviction relief). The Maricopa County Attorney also misunderstands what occurs in determining whether to file an ineffective assistance of counsel claim. When a prisoner files a Rule 32 notice, he or she frequently has ideas about how the trial attorney was ineffective. This may involve the theory of the case or a failure to have a witness testify. An attorney has an ethical duty to investigate whether the prisoner is correct. ER 1.3, Ariz. R. Prof’l Conduct, Ariz. R. Sup. Ct. 42. When a Rule 32 petition is filed following a plea,

the record is usually brief. However, when a petition is filed after trial, the prisoner has usually already had a direct appeal. Thus, a post-conviction attorney must review the trial attorney's file, including discovery, as well as the record on appeal and transcripts of the trial and the appellate briefs. The trial attorney's file may be extensive; a five-day trial with a 170-item record on appeal presently assigned to this office involves a trial attorney's file filling three banker's boxes. The Rule 32 attorney is ethically required to examine these documents to determine if the prisoner's theories are grounded in fact as well as to determine whether any other errors have been made. It may also be necessary to locate witnesses in other states. This does not involve relitigating the case, as the Maricopa County Attorney claims, but it does require an examination of the case by an independent lawyer.

The Maricopa County Attorney is correct that the Victim's Bill of Rights guarantees a prompt and final conclusion of the case. Art. II, § 2.1(10); Rule 39(b)(15). The removal of the requirement for extraordinary circumstances merely places the determination in the hands of the trial judge, who is capable of weighing the prisoner's rights against the victim's rights. Indeed, since ineffective assistance of counsel can be claimed on a first petition for post-conviction relief, *Pruett*, 185 Ariz. at 131, 912 P.2d at 1360, adequate time to investigate the first petition will save time by preventing a second petition.

Conclusion

The changes proposed in the Petition to Amend are necessary to accommodate the not-uncommon case with an extensive record or requiring extensive investigation. A longer initial period in which to file the petition will make it less likely that an extension of time will be requested. The change in the standard for granting the extension is necessary because some judges strictly construe the "extraordinary circumstances" standard, making it difficult to review all possible issues as the rule and ethics require. This is described in detail in the Petition to Amend. The changes affecting the state were proposed out of sense of fairness, but, if the county attorneys do not believe they are necessary, they can be deleted. Joy Athena of the Pima County Legal Defender is correct: the standard for granting extensions of time in Rule 32.6(b) was intended to be good cause.

DATED: June 30, 2008.

ROBERT J. HIRSH
PIMA COUNTY PUBLIC DEFENDER

By: _____

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